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5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

8 KIM ANDREW BERRY;

9 Plaintiff,

10 vs.

11 THE STATE OF CALIFORNIA,
12 CALIFORNIA STATE ATTORNEY
13 GENERAL BILL LOCKYER,
14 CALIFORNIA STATE JUDICIARY,
15 and
16 DOES 1-5;

17 Defendants

CIV S-04-2580 LKK-KJM-PS

**OBJECTIONS TO MAGISTRATE
JUDGE’S FINDINGS AND
RECOMMENDATIONS
FOR DISMISSAL**

Date: February 23, 2005
Time: 10:00 am
Courtroom: 26
Judge: HON. KIMBERLY J.
MUELLER

18 Honorable Judge Lawrence K. Karlton,

19 The Findings and Recommendations for dismissal under *Rooker-Feldman* ignore
20 the pivotal fact that the complaint seeks only prospective relief – as evidenced by the
21 complaint’s standing (para 15.c)¹ cause of action (para 58),² no retrospective relief from
22 prior judgments sought in Prayer (para 62-66), and throughout the response pleading. The
23 “prospective relief” aspect *distinguishes the instant action from all authorities that the
Findings are Recommendations relies upon.*

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25 ¹ “The threat of *further* sanctions...”

² “Plaintiff *will be chilled from appealing* from unjust and improper family law orders.”

1 No *Rooker-Feldman* authority deprives jurisdiction of prospective relief pertaining
2 to future and independent state proceedings. On the contrary, as the timely authorities
3 below hold, jurisdiction is proper.

4 5 **ARGUMENT**

6 **1.**

7 **THIS COURT HAS SUBJECT MATTER JURISDICTION**

8 **A. The Ninth Circuit recently reversed Rooker-Feldman absence in a case** 9 **strikingly analogous to the instant action**

10 On December 14, 2004 the Ninth Circuit filed Wolfe v. Strankman (No. 02-15720
11 - CV-00-01047-SBA) which is highly analogous to the case at bar. There plaintiff Wolfe
12 sought a declaration that California's vexatious litigant statute is unconstitutional and
13 sought injunctive relief barring enforcement of that statute, prospectively.

14 The Ninth Circuit began its *Rooker-Feldman* analysis by examining the same Noel
15 v. Hall, 341 F.3d 1148 that Plaintiff cited at response page 4. Just as at bar, Wolfe had
16 previously been penalized under the state statute that he now challenged prospectively.
17 The Ninth Circuit found that "since there was no vexatious litigant order entered against
18 Wolfe at the time he filed in district court, there was no state court judgment from which
19 he could have been seeking relief." Instead, the Ninth Circuit construed the prior cases as
20 a demonstration of standing - "tending to show that he will act in this way again and that
21 the statute will be enforced against him again."

22 Analogously at bar there is no state court sanction judgment from which Plaintiff
23 could be seeking relief: The sanction order in *Berry II* was final October 2004 when the
24 California Supreme Court denied review.

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2 **B. The U.S. Supreme Court has recently confined Rooker-Feldman absence**

3 In Exxon Mobil Corp. et al. v. Saudi Basic Industries Corp. (No. 03-1696. Argued
4 February 23, 2005--Decided March 30, 2005), The Supreme Court explained:

5 The *Rooker-Feldman* doctrine, we hold today, is confined to cases of
6 the kind from which the doctrine acquired its name: cases brought by
7 state-court losers complaining of injuries caused by state-court
8 judgments rendered before the district court proceedings commenced
9 and inviting district court review and rejection of those judgments.
(Emphasis added)

10 . . . Nor does [28 USC §1257] stop a district court from exercising
11 subject-matter jurisdiction simply because a party attempts to litigate
12 in federal court a matter previously litigated in state court. If a federal
13 plaintiff "present[s] some independent claim, albeit one that denies a
14 legal conclusion that a state court has reached in a case to which he
15 was a party ... , then there is jurisdiction and state law determines
16 whether the defendant prevails under principles of preclusion." *GASH*
17 *Assocs. v. Village of Rosemont*, 995 F. 2d 726, 728 (CA7 1993);
18 accord *Noel v. Hall*, 341 F. 3d 1148, 1163-1164 (CA9 2003). (Exxon
19 *ibid*, pages unknown)

20 Because prospective relief does not and cannot undo a prior state court judgment,
21 *Rooker-Feldman* does not deprive this court of jurisdiction.³ The instant prospective
22 challenge of a new rule of law is independent from the *Berry II* appeal from a prior
23 sanction in state court. Accordingly, abstention would be a miscarriage of justice.
24

25

3 Nor would preclusion span to independent future sanctions: Each future sanction would
be an independently appealable judgment. E.g., *res judicata* would not preclude a party
from raising defenses in a subsequent DUI charge, even if those same defenses were
unsuccessfully raised in a prior DUI charge. Further, since nothing is pending in State
court, Younger is not a bar.

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2 **C. Plaintiff submits new evidence that was not available when he drafted his**
3 **response pleading, which refutes that the instant action is “intertwined” with**
4 **a specific state judgment**

5 *Berry II* is merely one piece of evidence demonstrating California's policy of law for
6 sanctions against nonfrivolous appeals. Since filing the response, additional evidence has
7 emerged, to wit, the admissions within Defendants' reply pleading:

- 8
- 9 • At pp 3-4 Defendants' declare that their policy of sanctioning good faith,
10 nonfrivolous appeals outside of the bounds of the landmark Flaherty standard and
11 the California Rules of Court is not a new rule of law, but rather an ongoing
12 practice – albeit contrary to published authorities.
 - 13 • On page 5 line 5, the California State Judiciary asserts, contrary to the authorities
14 in the complaint (para 43, 49, and 50), that State trial courts may sanction appeals
15 from their own rulings if they deem the appeals "unnecessary" or a "frustration of
16 settlement."
 - 17 • On p 5 line 22 Defendants claim that "Flaherty is only controlling in those cases in
18 which an appellate court itself imposes sanctions," and therefore the standard does
19 not apply if, as at bar, the appellate court remands with direction to the trial court
20 to award appellate fee sanctions.

21 In light of Defendants' admissions regarding the unwritten policy of California, the
22 instant action could stand alone without any reference to *Berry II*. This is prima-facie that
23 *Berry II* is not "intertwined" with the instant action, and thus *Rooker-Feldman* does not
24 bar jurisdiction. It is immaterial whether evidence of the challenged rule of law is derived
25 from *Berry II*, *Smith I*, new legislation, or admissions by the defendants.

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2 **D. The complaint does not challenge a judgment, but rather the constitutionality**
3 **of a rule of law**

4 The F&R misrepresents the instant action as seeking a declaration that Family Code
5 section 271 is unconstitutional “*as applied to plaintiff.*” (p.1) But response p.7 clarifies
6 that “as applied” means “*as promulgated by the new Rule of Law*” against sanctions
7 against good faith, nonfrivolous appeals – on the vague grounds that the appeals are
8 “unnecessary” or “frustrated a settled matter.”

9
10 As in *Buckley*,⁴ if Dubuc were seeking to obtain relief against the
11 denial of his 1998 application, instead of simply seeking to clear away
12 the allegedly unconstitutional rules so that he can reapply to the Bar in
13 the future unimpeded by these rules, then *Rooker-Feldman* would
14 apply. But Dubuc is not asking the district court to expunge the denial
15 of his 1998 application or do anything else to correct or revise
16 defendants’ denial of his 1998 application. Therefore, *Rooker-*
17 *Feldman* does not bar his lawsuit. *Duboc v. Googasian* , No. 02-1897
18 - 2003 FED App. 0313P (6th Cir.)⁵

16 **PRAYER FOR RELIEF**

17 Because this court can construe⁶ the complaint’s citations to *Berry II* as a
18 demonstration of standing – consistent with *Wolfe v. Strankman*, and because the cause
19 of action is a prospective challenge to a rule of law – distinct from the state judgment,
20 this court has jurisdiction. Accordingly, Defendants' motion to dismiss should be denied.
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⁴ *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993).

24 ⁵ www.ca6.uscourts.gov/opinions.pdf/03a0313p-06.pdf (in list of published opinions)

25 ⁶ “We construe the complaint liberally because it was drafted by a pro se plaintiff.” *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987).

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May 16, 2005

Respectfully submitted,

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4 CASE NAME: Berry v State of California
NO: CIV S-04-2580 LKK-KJM-PS
5

6 **DECLARATION OF SERVICE BY MAIL**

7 I am a resident of Sacramento County, California. I am over the age of eighteen (18) and
8 not a party to the within above-entitled action. My home address is 708 Bidwell Street,
Folsom, California.

9 On this date, May 16, 2005, I served the parties named below with true copies of:

10 **OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND**
11 **RECOMMENDATIONS FOR DISMISSAL**

12 By placing the document in the United States mail, addressed to:

13

BILL LOCKYER, 14 Attorney General of the State of California 1300 I Street 15 Sacramento, CA, 94244-2550

16
17 I declare under penalty of perjury under the laws of the State of California that
the foregoing is true and correct.

18 Executed this 16th day of May 2005, at Sacramento, California.
19
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21 _____
TESS PITOY
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